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Supreme Court, U.S.
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No. 02-293

IN THE

Supreme Court of the United States

EDWARD WILHELM,

Petitioner,

v.

JOHN A. BOGGS, Deputy and
JOSEPH TANNER, Deputy,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner frames his sole statement of the question as follows:

> Can an appellate court reviewing the denial of a motion for summary judgment on the issue of qualified immunity refuse to apply a general rule established by the United States Supreme Court upon the sole basis that an opinion of the appellate court, if extended, may be inconsistent with the established law?

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit and the United States District Court, Northern District of Ohio, set forth the pertinent facts related to Wilhelm's claims. (Pet'r. App. A at A-1 and App. C at C-1).

Briefly stated, this case involves an incident that occurred on December 15, 1999 at 4130 Crum Road, Austintown, Ohio. The property located thereon was owned by the estate of Wilhelm's deceased father. Sheryl Foster, Wilhelm's sister, was appointed by the Mahoning County Probate Court as administratrix of her deceased father's estate. Upon the instructions of the attorney representing the estate, Foster went to the Crum Road property on December 15, 1999 to conduct an inventory of the property's assets.

Due to prior threats made against her by Wilhelm, who was staying at the Crum Road property, Foster elected to take sheriff's deputies Boggs and Tanner to accompany her while she entered the premises. Once at the home, Foster directed Boggs and Tanner to enter the home to insure that Wilhelm did not become combative with her. At that time, Boggs and Tanner entered the home. However, neither Boggs nor Tanner participated in the inventory completed by Foster.

Wilhelm filed suit in the District Court alleging violations of his Fourth Amendment right to be free of unreasonable searches and seizures.

REASONS FOR DENYING THE PETITION

1. Wilhelm Has Not Articulated A Compelling Reason To Justify Discretionary Review By This Court.

"Review on a Writ of Certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A Petition for a Writ of Certiorari will be granted only for compelling reasons." Wilhelm has not presented any compelling reasons for this Court to

exercise discretionary jurisdiction over his appeal of the Sixth Circuit's decision reversing the order of the District Court.

2. The Sixth Circuit Court Of Appeals Properly Reversed The Decision Of The District Court.

In support of his argument that the Appellate Court decision was in error, Wilhelm relies primarily on the decision rendered by this Court in *Chapman v. United States*, 365 U.S. 610 (1961). In *Chapman*, the Court determined that a landlord cannot validly consent to the search of a home he has rented to another. However, after *Chapman*, this Court rendered its decision in *United States v. Matlock*, 415 U.S. 164 (1974), wherein the Court found that a search conducted pursuant to consent by an authorized third party does not require probable cause or a warrant. Then, in *Illinois v. Rodriquez*, 497 U.S. 177 (1990), this Court held that the Fourth Amendment is not violated when officers enter a residence without a warrant because they reasonably believe that the person who has consented to the entry is a resident of the premises. If a third party does not have actual authority to consent, law enforcement officers may nevertheless rely on his or her consent so long as the facts available to the officer at the moment would warrant a man of reasonable caution in the belief that the consenting party had authority over the premises. *Id.* Thus, Wilhelm's complete reliance on *Chapman*, without discussing the aforementioned intervening cases of this Court, is surely myopic.

Further, Wilhelm's argument in favor of this Court's exercise of jurisdiction displays a fundamental misunderstanding of the nature and scope of the affirmative defense of qualified immunity. Indeed, Wilhelm neglects to even discuss the qualified immunity issue in his petition. Clearly, in light of this Court's recent decision in *Saucier v. Katz*, 533 U.S. 194 (2001), the issue of qualified immunity must enjoy a paramount role in the Court's disposition of this case.

Typically when determining whether a public official is entitled to qualified immunity, a two prong test is employed. *See County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). First, the Court must determine whether a constitutional right was violated. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Next, the Court should determine whether that right was "clearly established." *Id.* "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "If the controlling law is not clearly established, an official cannot be liable because a reasonable person would not be expected to know how to structure his conduct in order to avoid liability." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994).

Further, the inquiry for determining whether a right is clearly established must be undertaken in light of the specific context of the case, not as a broad general proposition. *Saucier v. Katz*, 533 U.S. at 201. Finally, in *Anderson v. Creighton*, 483 U.S. 635, this Court found that although the objective reasonableness component of the qualified immunity analysis may at times seem to merge with a factual inquiry on an underlying Fourth Amendment claim, the inquiries must be distinct.

Under this standard, Wilhelm has failed to meet his burden of proving that the right allegedly violated was "clearly established" at the time the alleged violation occurred. The right allegedly violated was the Fourth Amendment right not to have a law enforcement officer enter the premises when an individual with a valid third party consent directs the law enforcement officers to enter. Unfortunately for Wilhelm, he has utterly failed to cite any case that establishes such a right, nor is it self evident. The factual scenario at issue in this matter is not one that appears to have been addressed in the case law. Thus, it would not be "clear to a reasonable officer that his conduct was unlawful in

the situation he confronted." *Saucier* 533 U.S. at 202. Consequently, the right asserted here was not clearly established.

The only decisions cited by Wilhelm actually support the Respondents' position that qualified immunity was appropriate. First, Wilhelm cites the unreported Sixth Circuit decision of *Haines v. Saginaw Police Dept.*, 35 F.3d 565 (Table) (6th Cir. 1994). In *Haines*, a landlord called the police department after she found two safe boxes in an apartment she was cleaning. After officers of the Saginaw Michigan Police Department entered Haines' apartment, they confiscated the safe boxes and charged Haines with several theft related offenses. After the criminal charges were later dismissed, for lack of evidence, Haines filed suit pursuant to 42 U.S.C. § 1983 for alleged violations of his Fourth Amendment rights.

The Court determined that no Fourth Amendment violation occurred because a valid third party consent was given by the landlord. Relying heavily on this Court's decision in *Illinois v. Rodriquez*, *supra*, the court found that summary judgment was appropriate even though a genuine dispute as to whether Haines had actually vacated his apartment may have existed. The court reasoned that "the question is not whether [the landlord] actually had the authority to consent to the search, but rather whether it was reasonable for the officers to believe that she did."

Next, Wilhelm cites the Sixth Circuit case of *United States v. Jenkins*, 92 F.3d 430 (6th Cir. 1996). Again, Wilhelm's reliance is materially misplaced. In *Jenkins*, the court was faced with determining whether a driver of a tractor trailer rig could consent to the search of the vehicle which was owned by the company the driver was working for. In determining that the consent was valid, the court found that "an officer is justified in thinking that the driver has authority to consent unless the officer knows (or is told) other information indicating that the usual assumption is incorrect." *Jenkins*, 92 F. 3d at 438. Further, the court decided

that "[b]ecause a reasonable officer in Trooper Lopez's position could have thought Holt had authority to consent to a search of the trailer, the consent validates the otherwise unreasonable search." *Id.*

Thus, in the cases cited by Wilhelm, the courts recognized the broad scope of the third party consent doctrine and determined that no Fourth Amendment violation occurred. Similarly, in this matter, based upon the information provided to the Respondents prior to their entering the premises on Crum Road, it is clear that an objectively reasonable officer in their position could have believed that Foster had common authority over the premises. Therefore, based upon applicable law of this Court, no Fourth Amendment violation occurred. Because there was no Fourth Amendment violation, the Appellate Court properly reversed the erroneous decision issued by the District Court.

CONCLUSION

Based upon the foregoing, Respondents respectfully request that the Court deny the petition of Edward Wilhelm for a Writ of Certiorari.

Respectfully submitted,

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